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Supreme Court, U.S.
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No. 96-464

In The

Supreme Court of the United States

October Term, 1996

JACKIE RAY CLINE,

Petitioner,

vs.

GEORGE W. ROGERS, individually, and in his capacity as Sheriff of McMinn County, and McMINN COUNTY, TENNESSEE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS GEORGE W. ROGERS, IN HIS CAPACITY AS SHERIFF OF McMINN COUNTY, AND McMINN COUNTY, TENNESSEE

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LIST OF INTERESTED PARTIES

The Petitioner is Jackie Ray Cline.

The Respondents are George W. Rogers, in his individual capacity; George W. Rogers, in his capacity as Sheriff of McMinn County; and McMinn County, Tennessee. Counsel for Mr. Rogers in his individual capacity is Peter D. Van de Vate. Counsel for Mr. Rogers in his capacity as Sheriff of McMinn County, and for McMinn County, Tennessee, are John W. Baker, Jr. and Gerald L. Gulley, Jr.

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The opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 87 F.3d 176 (6th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3267 (U.S. Sept. 23, 1996) (No. 96-464). For the convenience of this Court, all citations to the opinion will be to Appendix A, at App. 1. The unpublished Memorandum of that court is reproduced at Appendix B, at App. 19.

STATEMENT OF THE CASE

Petitioner filed a Complaint in the United States District Court for the Eastern District of Tennessee, Southern Division at Chattanooga, alleging that in June 1992, a private citizen asked Respondent George W. Rogers, Sheriff of McMinn County, Tennessee, to check any records that might indicate whether the Plaintiff had ever been arrested. The Petitioner further alleged that Sheriff Rogers not only performed a "local search" but requested arrest information from a National Crime Information Center ("NCIC") computer; subsequently Sheriff Rogers conveyed whatever arrest information that he obtained from these searches to the private citizen who had originally requested this information. The Petitioner requested relief under 42 U.S.C. § 1983 for violation of the Petitioner's federal civil rights; under 42 U.S.C. § 3789g pursuant to an implied right of privacy; and for violations of "State and federal common law rights to privacy."

In lieu of filing an Answer, Respondents George W. Rogers, in his capacity as Sheriff of McMinn County, and McMinn County, Tennessee ("Respondents") filed in

early November 1993 a motion to dismiss the Complaint in its entirety. The Petitioner responded to the motion to dismiss on or about November 22, 1993 after asking for, and receiving, an extension of time in which to respond to the Respondents' motion to dismiss. In the Petitioner's response to the motion to dismiss, the Petitioner proceeded to raise and argue several bases for denying the Respondents' motion to dismiss: (1) whether the Petitioner could proceed under 42 U.S.C. § 1983 for violations of 42 U.S.C. § 3789g; and (2) whether there is a comprehensive set of remedies in 42 U.S.C. § 3789g that precludes finding an implied private cause of action in 42 U.S.C. § 3789g. JA 26-34.[1]

After more than *ten (10) months* from the time that the Petitioner's response to the motion to dismiss was first filed, the District Court dismissed all of the Petitioner's claims against the Respondents; the trial court also dismissed the Petitioner's claims against Respondent George W. Rogers in his individual capacity. JA 21, 52. The federal district court ruled that the Petitioner could not prove any set of facts consistent with his allegations that would entitle Petitioner to any relief, on the following claims: (1) the claim under 42 U.S.C. § 1983 for violation of 42 U.S.C. § 3789g; (2) the direct claim under 42 U.S.C. § 3789g based on an implied right of action; (3) a federal constitutional claim, which exists directly and pursuant to 42 U.S.C. § 1983; and (4) a claim under the Tennessee state constitution. (App. 19-21).

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[1] The Joint Appendix filed with the United States Court of Appeals for the Sixth Circuit is referred to as "JA" followed by the respective pages referred to therein.

On appeal, the federal appellate court considered each of the grounds of dismissal stated by the trial court, as well as the Petitioner's argument that dismissal of all the Petitioner's claims was improper. (App. 1, 3, 17). After considering all of the legal arguments raised by the Petitioner; after considering the factual allegations made by the Petitioner in his Complaint; and after construing the Complaint "in the light most favorable to the [Petitioner], accept[ing] all factual allegations as true, and determin[ing] whether the [Petitioner] undoubtedly can prove no set of facts in support of his claims that would entitle him to relief," (App. 4), the federal appeals court affirmed the trial court's dismissal of the Petitioner's Complaint. (App. 1, 18).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONSTITUTIONAL CLAIM AVAILABLE TO THE PLAINTIFF BECAUSE THERE IS NO STATE OR FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY IN A PERSON'S PUBLIC CRIMINAL RECORD.

The Petitioner seeks to assert a constitutional protection for public criminal records under the rubric of a "privacy interest." Such an asserted right, however, is not one of those that are "implicit in the concept of ordered liberty." *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981). *See Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). The Petitioner cannot demonstrate that such records traditionally

have been given constitutional protection, and misconstrues the case law that he cites in support of such a proposition.

For example, in the case of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Petitioner claims to find support for the extension of constitutional protections to crime information in "rap sheets." (Petition at 7-9). In the first place, there is nothing in the record in the case at bar, either that was before the trial court or the court of appeals, that gives any indication that the extent of information allegedly obtained by Sheriff Rogers was similar to the information in the "rap sheets" in *Reporters Committee*; there is merely the gratuitous comment by the Petitioner that the information is equivalent. (Petition at 8).

Further, use of the *Reporters Committee* case as a basis for review by this Court, on the grounds that the case at bar presents a question that was "reserved" in the *Reporters Committee* case, is inappropriate as well as disingenuous of the Petitioner. The footnote referred to by the Petitioner as supporting "reservation" of the constitutional question of "an individual's interest in privacy" is taken out of context. In fact, read in its entirety, the footnote referred to by the Petitioner *rejects* the notion that there is any federal constitutional protection for a person's privacy interest in criminal arrest information. (Petition at 8-9). *See Reporters Committee*, 489 U.S. at 762 n.13 (citing *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975) and *Paul v. Davis*, 424 U.S. 693 (1976) for the proposition that no constitutional privacy right is implicated in publicizing information from arrest reports). Indeed, *Reporters Committee* is based on federal statutory

protections similar to those relied upon by the court of appeals in the case at bar and by the Seventh Circuit in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983). *See Reporters Committee*, 489 U.S. at 751 (citing 5 U.S.C. § 552(b)). The decision by the court of appeals in the case at bar therefore does not conflict with relevant decisions of this Court.

The case of *Whalen v. Roe*, 429 U.S. 589 (1977), is cited by the Petitioner to support his argument that this Court needs to explore constitutional parameters of revealing criminal arrest information. (Petition at 10-11). Contrary to the Petitioner's argument, however, this Court did not reserve a constitutional question regarding arrest information that is available through public sources; rather, *Whalen*, unlike the case at bar, dealt with the release of "accumulated private data" – specifically, the names of persons who received prescriptions for certain types of drugs that could be used illegally – which is not the type of public information at issue here. *Whalen*, 429 U.S. at 591, 605.

The case of *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. Unit B 1981), does not stand for the proposition cited by the Petitioner, to-wit, that release of arrest records is a constitutional violation. In *Fadjo*, the plaintiff was subpoenaed to testify and provide documents in connection with an investigation by the state attorney general; the plaintiff provided "information concerning 'the most private details of his life' " in exchange for assurances that "his testimony was absolutely privileged under [state] law and that the contents of his testimony would be revealed to no one." *Fadjo*, 633 F.2d at 1174. Thus, it was the nature of the information that was important in *Fadjo*, not the

fact, as the Petitioner argues, that the information was given in a criminal investigation. In the case at bar, there was no allegation before either the trial court or the court of appeals that the type of information obtained was anything other than criminal history information. Further, the dictum in *Fadjo* in which *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329 (5th Cir. 1973) is distinguished is inapposite to this case. There is no basis for constitutional review by this Court of well-settled law.

In summary, there is no important question of federal law raised by the Petitioner with respect to this issue that needs to be settled by this Court. Nor does misinterpretation of case law by the Petitioner create a basis for granting a writ of certiorari. The Petition for a Writ of Certiorari should be denied.

II.

THE COURT OF APPEALS APPLIED THE PROPER RULE OF LAW TO DETERMINE THAT THE PETITIONER DID NOT HAVE AN ENFORCEABLE RIGHT UNDER 42 U.S.C. § 3789g.

The Petitioner recognizes that the court of appeals correctly used the three-part test to determine whether a federal statute creates enforceable rights. (Petition at 13, n.2). The Petitioner simply argues that the court of appeals misapplied the applicable law. (Petition at 17).

This is not a basis for grant of writ of certiorari. U.S. Sup. Ct. R. 10. The trial court and the court of appeals both applied the proper statutes and regulations to the Petitioner. Of the sections under 42 U.S.C. § 3789g that might be available to the Petitioner, only 42 U.S.C.

§ 3789g(b) is applicable. Although the Petitioner notes that "§ 3789g protects 'the privacy of a class of individuals from disclosure by any person,' " the Petitioner quotes the text from *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983) out of context: the section in question that the Petitioner cites refers not to the entire text of § 3789g, but only to § 3789g(a), which deals with "research or statistical information" and which, as defined in 28 C.F.R. § 22.2, does not apply to the Petitioner. (Petition at 13).

The Petitioner alleged only that the Respondents checked the arrest records of the Petitioner and passed on information about the Petitioner's criminal record. JA 6. This places the Petitioner, as the court of appeals correctly stated, within the purview of § 3789g(b); and compliance with this section is with the federal Office of Justice Programs. The court of appeals correctly stated that the Petitioner was precluded from maintaining an "enforceable right" under the only section of § 3789g that applied to him.

The appropriate law was correctly applied by the courts below. Consequently, the Petition for a Writ of Certiorari must be denied.

III.

THE COURT OF APPEALS APPLIED THE PROPER RULE OF LAW TO FIND THAT THE PLAINTIFF HAS NO REMEDY UNDER 42 U.S.C. § 1983.

The Petitioner acknowledges that the court of appeals used the appropriate case law in setting forth the test to determine whether a federal statute by its own terms forecloses enforcement under 42 U.S.C. § 1983.

(Petition at 18, n.4). The Petitioner, however, only argues that the court of appeals misapplied the applicable law.

Although the Petitioner asserts that the court of appeals misconstrued applicable regulations, this is not the case. Under 28 C.F.R. § 20.20(c), criminal history information that can be released includes the type of information that is listed under 28 C.F.R. § 20.20(b): among other types of information, "court records of public judicial proceedings"; "published court or administrative opinions or public judicial, administrative or legislative proceedings"; and "records of traffic offenses." This type of information encompasses arrest records, which would be public court records or judicial or administrative proceedings. For the Petitioner to state that such information, including arrest records, does not "include criminal history information stored in the NCIC data base," when by definition "criminal history information" *does* include such information, 42 U.S.C. § 3791(a)(9), is simply not correct and is misleading to this Court. (Petition at 16-17).

The court of appeals applied properly stated law. Under Supreme Court Rule 10, there is no reason for this Court to review same. Consequently, the Petition for a Writ of Certiorari should be denied.

IV.

THERE IS NO CONFLICT AMONG FEDERAL COURTS OF APPEALS ON THE QUESTION OF AN IMPLIED PRIVATE CAUSE OF ACTION UNDER 42 U.S.C. § 3789g.

One basis for grant of a petition for writ of certiorari is a conflict between federal courts of appeals that have decided "the same important matter." U.S. Sup. Ct. R. 10(a). Such a basis, however, is utterly lacking in the Petition in the case at bar.

Only one other federal court of appeals has decided the question whether a person may bring a direct claim for violation of 42 U.S.C. § 3789g. The United States Court of Appeals for the Seventh Circuit, in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983), ruled that 42 U.S.C. § 3789g(b) does not create a direct, private cause of action. That ruling was followed by the court of appeals in the case at bar. (App. 10, 16-17).

In summary, there is no inherent contradiction or inconsistency in the interpretation of 42 U.S.C. § 3789g regarding an absence of implied private cause of action, as developed through the common law methodology. Thus, there is no need for the United States Supreme Court to interfere with the development of the case law in this area. *E.g., Braxton v. United States*, 500 U.S. 344, 347 (1991).

V.

ANY ERROR IN DISMISSING THE COMPLAINT WAS HARMLESS BECAUSE THE PLAINTIFF NEITHER ALLEGED, NOR AMENDED THE COMPLAINT TO ALLEGE, FACTS THAT WOULD ENTITLE HIM TO RELIEF, AND HIS CLAIMS WERE THUS FUTILE.

The Petitioner's argument regarding dismissal of all of his claims is essentially that the federal court of appeals misapplied the proper rule of law. As such, this is not a basis for grant of writ of certiorari. U.S. Sup. Ct. R. 10.

The Petitioner correctly cites the controlling law on this question, which is that when faced with a motion to dismiss, a plaintiff must "be given a chance to amend the complaint or respond to notice of an impending dismissal for failure to state a claim." *Morrison v. Tomano*, 755 F.2d 515, 517 (6th Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)). What the Petitioner omits to tell this Court is that he *was* given a chance to amend the Complaint – in point of fact, the Petitioner had over *ten months* in which to amend the Complaint, from the time that the Respondents filed their motion to dismiss the Complaint, until the trial court dismissed it. JA 9-10, 52. The Petitioner, however, chose to do nothing.

Further, as the trial court appropriately noted, the motion to dismiss asked that the *entire Complaint* be dismissed, not just a single count. JA 9. If the trial court chooses to find additional reasons for dismissal and acts on those, that is within the discretion of the trial court. (App. 17-18). *Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994); Fed. R. Civ. P. 78. The court of appeals so found, and this issue does not need further review by this Court.

The Respondents would finally note that the Petitioner is being less than forthright with this Court by stating, in the "Questions Presented," that the Petitioner "did not receive prior notice of the intention of the court to dismiss and the opportunity to respond. . . . " (Petition at i). As noted above, the Petitioner was put on clear notice in November 1993 that the Respondents sought dismissal of the entire Complaint; further, the Petitioner had ample opportunity to respond *or* to amend his Complaint pursuant to applicable case law. There is no basis here for granting a petition for writ of certiorari.

CONCLUSION

The Respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The Petitioner has had appropriate review at both the federal district and appellate court levels. The decisions of these courts are proper, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

No. 94-6399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACKIE RAY CLINE, *Plaintiff-Appellant,* v. GEORGE W. ROGERS, individually and in his capacity as Sheriff of McMinn County and McMINN COUNTY, TENNESSEE, *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed June 25, 1996

Before: MERRITT, Chief Judge; BATCHELDER, Circuit Judge; DOWD, District Judge.*

ALICE M. BATCHELDER, Circuit Judge. The plaintiff-appellant appeals from the district court's judgment dismissing with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), all his claims against both defendants in this case. For the reasons that follow, we affirm.

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

I.

The plaintiff-appellant, Jackie Ray Cline ("Cline"), alleges that in 1992, a private citizen contacted the Sheriff's Department of McMinn County, Tennessee ("the County"), and asked Sheriff George Rogers to check Cline's arrest record. According to Cline, Rogers searched state and local records and requested a computer search of National Crime Information Center ("NCIC") records of the Federal Bureau of Investigation ("FBI"). Cline alleges that Rogers disclosed to the private citizen the information Rogers obtained regarding Cline's criminal history, in violation of both Tennessee and federal law.

Cline filed this lawsuit against Rogers, individually and in his official capacity as sheriff. Cline also named the County as a defendant, alleging that improper searches of criminal records is "a routine and customary practice in McMinn County," that the County "lacks adequate controls to ensure that access to criminal records is for authorized purposes only," that the County did not have in place an adequate system to detect misuse of criminal records, that the County had provided inadequate training to prevent such abuse, and that the County had "been indifferent to the civil rights of private citizens by allowing such abuses to continue."

Cline's complaint sought damages under 42 U.S.C. § 1983 for violation of his federal civil rights. The complaint also asserted an implied private right of action under 42 U.S.C. § 3789g. Finally, the complaint alleged "violations of State and federal common law rights to privacy." Rather than answering the complaint, the

defendant County filed its motion "to dismiss the Complaint against it on the ground that the Complaint fails to state a claim upon which relief can be granted against this Defendant in that 42 U.S.C. § 3789(g) [*sic*] does not, as a matter of law, provide a private right of action to [Cline] to be maintained under 43 [*sic*] U.S.C. § 1983."

The defendant Rogers answered the complaint. Rogers apparently did not file a separate motion to dismiss. After Cline's counsel sought and received an extension of time to respond to the County's motion to dismiss the complaint, the plaintiff filed a response. Following motions by Cline's counsel for a continuance, the district court ruled on the County's motion to dismiss the complaint. In its memorandum of opinion, the court explained that all of Cline's claims against both Sheriff Rogers and the County were dismissed with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), because Cline "undoubtedly cannot prove any set of facts consistent with his allegations which would entitle him to relief, i.e., the plaintiff is not entitled to relief despite the facts as pleaded." Further, the court held that *sua sponte* dismissal with respect to defendant Rogers was appropriate pursuant to Rule 12(b)(6) and this Court's precedent, citing *Morrison v. Tomano*, 755 F.2d 515 (6th Cir. 1985). This timely appeal followed.

II.

We review *de novo* the district court's dismissal for failure to state a claim upon which relief can be granted. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). The court must construe the

complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

A. The Federal Constitutional Claim

There is no violation of the United States Constitution in this case because there is no constitutional right to privacy in one's criminal record. Nondisclosure of one's criminal record is not one of those personal rights that is "fundamental" or "implicit in the concept of ordered liberty." *See Whalen v. Roe*, 429 U.S. 589 (1977). In *Whalen*, the Supreme Court distinguished fundamental privacy interests in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" and "individual interest in avoiding disclosure of personal matters," *see id.* at 599, finding no general constitutional right to nondisclosure of private data, *see id.* at 608-09 (Stewart, J., concurring).

Moreover, one's criminal history is arguably not a private "personal matter" at all, since arrest and conviction information are matters of public record. *See Paul v. Davis*, 424 U.S. 693 (1976) (rejecting a similar claim based on facts more egregious than those alleged here); *see also J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (interpreting *Paul* in light of subsequent Supreme Court cases (*Whalen* and *Nixon v. Administrator*, 433 U.S. 425 (1977)) and holding that there is no general right to a constitutional balancing of government action against individual privacy

absent personal rights that are "fundamental" or "implicit in the concept of ordered liberty"). Although there may be a dispute among the circuit courts regarding the existence and extent of an individual privacy right to nondisclosure of "personal matters," *see Slayton v. Willingham*, 726 F.2d 631 (10th Cir. 1984); *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. Unit B 1981) (both opining that *Paul* has been at least partially overruled by the Supreme Court's decisions in *Whalen* and *Nixon*), this circuit does not recognize a constitutional privacy interest in avoiding disclosure of, *e.g.*, one's criminal record. *See DeSanti*, 653 F.2d at 1090 (regarding disclosure of juvenile delinquents' "social histories"); *see also Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (disclosure of inmate's HIV infection did not violate constitutional right of privacy).

Because there is no privacy interest in one's criminal record that is protected by the United States Constitution, Cline could prove no set of facts that would entitle him to relief; therefore, the district court correctly dismissed this claim.

B. State Constitutional Claim

The plaintiff can state no claim of a state constitutional violation in this case because Tennessee does not recognize a private cause of action for violations of the Tennessee Constitution. *See Lee v. Ladd*, 834 S.W.2d 323 (Tenn. Ct. App.), *appeal denied*, (Tenn. 1992). There, the Tennessee Court of Appeals, searching for authority to support or refute the plaintiff's claim of an implied cause of action for violations by a local police officer of her civil rights under the Tennessee Constitution, stated:

> We have held . . . that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer. *See Bennett v. Horne*, 1989 WL 86555 (No. 89-31-II, Tenn. Ct. App. . . . August 2, 1989). So far as we are able to determine, the Tennessee courts have not extended the rationale of *Bivens* [*v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] to give a state cause of action against a police officer for violating a person's civil rights.

Lee, 834 S.W.2d at 325. Therefore, the district court properly dismissed this claim.

C. Direct Claim for Violation of 42 U.S.C. § 3789g

1.

The plaintiff claims that the defendants violated enforceable privacy rights created in him by Congress under the Justice System Improvement Act of 1979, 42 U.S.C. §§ 3701-3797 ("the Act"). Specifically, Cline claims that the defendants violated 42 U.S.C. § 3789g, which provides for confidentiality of information under the Act. That section has four subsections: § 3789g(a) prohibits the unauthorized dissemination of research or statistical information;[1] § 3789g(b) requires the Office of Justice

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[1] This subsection states:

> **Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings**
>
> Except as provided by Federal law other than this chapter, no officer or employee of the Federal

Programs to safeguard the accuracy and security of criminal history information;[2] § 3789g(c) requires that criminal

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Government, and no recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

42 U.S.C. § 3789g(a).

[2] This subsection states:

Criminal history information; disposition and arrest data; procedures for collection, storage, dissemination, and current status; security and privacy; availability for law enforcement, criminal justice, and other lawful purposes; automated systems: review, challenge, and correction of information

All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him

intelligence information be handled in conformity with policy standards prescribed by the Office of Justice Programs;[3] § 3789g(d) states that "[a]ny person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law."

The district court correctly found that the only subsection of § 3789g even arguably applicable in this case is § 3789g(b), which addresses the confidentiality of criminal history information. Subsection 3789g(a) is inapplicable because that section deals with "research or statistical information." That term is not defined in the statute;

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contained in an automated system is inaccurate, incomplete, or maintained in violation of this chapter, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

42 U.S.C. § 3789g(b).

[3] This subsection states:

Criminal intelligence systems and information; prohibition against violation of privacy and constitutional rights of individuals

All criminal intelligence systems operating through support under this chapter shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Programs and which are written to assure that the funding and operation of these systems furthers the purpose of this chapter and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

42 U.S.C. § 3789g(c).

however, the Department of Justice regulations define the term to mean "any information which is collected during the conduct of a research or statistical project and which is intended to be utilized for research or statistical purposes." 28 C.F.R. § 22.2(d). "Research or statistical project" is defined as "any program, project, or component thereof which is supported in whole or in part with funds appropriated under the Act and whose purpose is to develop, measure, evaluate, or otherwise advance the state of knowledge in a particular area." 28 C.F.R. § 22.2(c). Cline's complaint does not allege that the information Sheriff Rogers allegedly disclosed to a private citizen was information about Cline that had been collected during a research or statistical project supported with funds appropriated under the Act. Subsection 3789g(a) is therefore inapplicable in this case.

Similarly, § 3789g(c) is inapplicable here, because that subsection deals with "criminal intelligence systems and information." Those terms also are not defined in the statute but are defined by the Justice Department's regulations. "Criminal intelligence system" means "the arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information." 28 C.F.R. § 23.3(b)(1). "Criminal intelligence information" is defined as

> data which has been evaluated to determine that it:
>
> (i) Is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and

> (ii) meets criminal intelligence system submission criteria[.]

28 C.F.R. § 23.3(b)(3). "Criminal activity" includes, but is not limited to, "loan sharking, drug trafficking, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials[.]" 28 C.F.R. § 23.2. The complaint in this case does not allege facts to support a claim that the defendants improperly disclosed "criminal intelligence information" regarding the plaintiff; therefore, subsection (c) of § 3789g is inapplicable.

2.

What the plaintiff's complaint does allege is that Sheriff Rogers improperly disclosed Cline's arrest record. Arrest records fall under § 3789g(b), which addresses criminal history information. The definitions section of the statute provides that

> "criminal history information" includes records and related data, contained in an automated or manual criminal justice informational system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release[.]

42 U.S.C. § 3791(a)(9). Although Cline alleges that the defendants improperly disclosed information regarding his arrest record, Cline may not maintain a private right of action under § 3789g(b), because § 3789g(b) does not create a direct, private right of action. *See Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983). In addition,

subsection (b) imposes no obligations upon these defendants; rather, the subsection mandates that the Office of Justice Programs, a federal agency, "assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes." 42 U.S.C. § 3789g(b). The subsection does entitle an individual to review and challenge inaccurate or incomplete criminal history information concerning the individual; however, Cline does not allege that the information regarding his arrest record that the defendants allegedly disclosed was inaccurate or incomplete. Even if that were the case, Cline's cause of action in that regard would be against the responsible federal agency, not state or local authorities. *See id.*

3.

Cline argues that he can bring a direct claim under 42 U.S.C. § 3789g(d), the penalty provision, because it makes reference to "any rule, regulation, or order issued" under the section, and the regulations of the Department of Justice prohibit the misuse of criminal history information by anyone having authorized access to such information. *See* 28 C.F.R. § 20.21(c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). However, even if, *arguendo*, the state and local authorities are considered an "agency" within the meaning of the Act, the regulations also provide: "Nothing in these regulations prevents . . . a criminal justice agency . . . from confirming prior criminal history record information to

members of the news media *or any other person,* upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed. . . . " 28 C.F.R. § 20.20(c) (emphasis added). Again, it is noteworthy that Cline does not allege that the information Sheriff Rogers allegedly disclosed was incorrect.

Congressional intent is the touchstone of whether private enforcement of a statute is permitted. Since the late 1970s, Congress has been on notice that, if it intends to create a private right of action, it had better do so expressly in the statute. The Supreme Court, mindful of separation of powers concerns, appears to have modified the four-part analysis of *Cort v. Ash,* 422 U.S. 66 (1975), upon which Cline relies, in favor of an inquiry regarding congressional intent: Did Congress intend to provide a private right of action under the statute, or did Congress intend to foreclose private enforcement of the statute? The Supreme Court has been increasingly reluctant to find an implied cause of action where Congress had the opportunity to create a private right explicitly but did not do so. *See Cannon v. University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). *Accord Herman & MacLean v. Huddleston,* 459 U.S. 375 (1983) (private right of action inferred because it had been consistently recognized for more than 35 years); *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353 (1982) (private cause of action recognized because fact that Congress had amended the statute twice without speaking to the question led to compelling inference that Congress intended to preserve implied private remedy previously recognized).

In this case, the statute at issue was part of the Justice System Improvement Act, Pub.L. 96-157, enacted December 27, 1979, at the end of the very year in which the Supreme Court issued its decisions in *Cannon* and *Touche Ross*, cautioning Congress that it must make explicit its intent to provide a private right of action, else the courts would not imply one. It is an inescapable conclusion that Congress, enacting this statute soon after having been so admonished, did not intend to create a private right of action for violation of 42 U.S.C. § 3789g. Indeed, the fact that Congress created a generalized administrative scheme, complete with a penalty provision in subsection (d) and the possibility of redress against federal agencies through the Privacy Act, 5 U.S.C. § 552a, is further proof of congressional intent not to create a private right of enforcement of this statute. The district court properly dismissed Cline's direct claim under 42 U.S.C. § 3789g.

D. Claims Under 42 U.S.C. § 1983

In *Maine v. Thiboutot*, 448 U.S. 1, 4-6, 100 S.Ct. 2502, 2504-05 (1980), the Supreme Court established a § 1983[4]

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[4] "Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights*, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added).

remedy for violations of a federal statute, *see Suter v. Artist M.*, ___ U.S. ___, ___, 112 S.Ct. 1360, 1366 (1992) (citing *Thiboutot*), but since then has held that no such remedy exists if "(1) the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2517 (1990) (internal quotation marks and brackets omitted) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423, 107 S.Ct. 766, 770 (1987)); *Wright*, 479 U.S. at 423, 107 S.Ct. at 770 (recognizing these two exceptions) (citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, [19,] 101 S.Ct. 2615[, 2626] (1981) (declining to consider whether the acts in question created rights, privileges or immunities under § 1983 when Congress had foreclosed a § 1983 remedy under the acts)), *quoted in Suter*, ___ U.S. at ___, 112 S.Ct. at 1366.[5]

To determine whether the first of these two exceptions applies, the Court has developed a three part test:

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[5] Reading only *Suter* could lead one to believe a § 1983 action is unavailable as a remedy for a violation of a federal statute only "where Congress has foreclosed such enforcement of the statute in the enactment itself *and* where the statute did not create enforceable rights, privileges or immunities[,]" ___ U.S. at ___, 112 S.Ct. at 1366 (emphasis added) (quoting *Wright*), *i.e.*, only where both conditions are met. *Wilder*, *Wright*, and *Middlesex County* reveal that such a belief would be mistaken. The presence of either exception does away with a § 1983 claim.

> (1) Was the provision in question intended to benefit the plaintiff?
>
> (2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather than merely expressing congressional preference?
>
> and (3) Is the interest the plaintiff asserts specific enough to be enforced judicially, rather than being "vague and amorphous"?

Wayne v. Village of Sebring, 36 F.3d 517, 529 (6th Cir. 1994) (citing *Wilder*, 496 U.S. at 509, 110 S.Ct. at 2517), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2000 (1995); *Wood v. Tompkins*, 33 F.3d 600, 604-05 (6th Cir. 1994) (citing *Wilder*); *see also "Tony" L. ex rel. Simpson v. Childers*, 71 F.3d 1182, 1188 (6th Cir. 1995) (citing *Wilder*), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___ (1996); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994) (citing *Wilder*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1099 (1995).[6] When a statute imposes no direct obligations on the states, and instead places "the onus of compliance with the statute's substantive provisions on the federal government," there is no § 1983 claim. *Audette v. Sullivan*, 19 F.3d 254, 256-57 (6th Cir. 1994) (quoting *Stowell v. Ives*, 976 F.2d 65, 70 (1st Cir. 1992)); *Clifton v. Schafer*, 969 F.2d 278, 283-85 (7th Cir. 1992).

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[6] A plaintiff bears the burden of proving that the first exception does not apply, while a defendant bears the burden of proving that the second exception does apply. *Wayne*, 36 F.3d at 529 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 107, 110 S.Ct. 444, 448, 449 (1989)); *Wood*, 33 F.3d at 605 (citing *Golden State Transit*).

As explained *supra*, only subsection (b) of 42 U.S.C. § 3789g is potentially implicated by the allegations of this plaintiff's complaint, and that subsection imposes compliance obligations only on a federal agency, not upon these defendants. Further, the purpose of § 3789g(b) is to provide for the maintenance and accuracy of criminal history information, with a specific provision included entitling "an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation" of the statute "to review such information and to obtain a copy of it for the purpose of challenge or correction." 42 U.S.C. § 3789g(b). The only privately enforceable right created by this subsection of the statute in an individual such as Cline is the right to receive a copy of criminal history information maintained pursuant to the statute for his review and possible correction in the event of erroneous information. Title 42 U.S.C. § 3789g does not provide a privately-enforceable federal right to nondisclosure of accurate criminal history information; therefore, Cline's § 1983 claims fail. Rather than creating a federal right which may be privately enforced either directly under the statute or through an action under § 1983, Congress created an administrative scheme intended to assure that criminal history information, criminal intelligence information, and research and statistical information be used only for the purposes for which it was collected. The remedy for violations is provided by the statute itself, *see* 42 U.S.C. § 3789g(d), and, with respect to federal agencies, by the Privacy Act of 1974, 5 U.S.C. § 552a(a)(1). The provision of these remedies is further proof that Congress intended to foreclose private

enforcement of § 3789g. *See Polchowski*, 714 F.2d at 752. The district court properly dismissed Cline's § 1983 claims.

III.

Finally, Cline argues that the district court was too hasty in dismissing his complaint because "[v]ery little discovery had been undertaken at the time," the district court assumed that only subsection (b) of § 3789g applied in this case, and Cline might have discovered that the defendants had actually violated another subsection, or that "a contract existed between the Defendants and the FBI – the agency that controls the NCIC data base – and that he may have a cause of action under a contract theory." Of course, Cline's complaint does not make such allegations, and he appears to have made no effort to amend it. Although "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), it is "not proper to assume the [plaintiff could] prove facts [he] had not alleged or that the defendants had violated applicable laws in ways that had not been alleged." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983); *Brennan v. Chestnut*, 777 F. Supp. 1469, 1472-73 (D. Minn. 1991), *aff'd*, 973 F.2d 644 (8th Cir. 1992).

Moreover, although Cline argues that the district court's dismissal of his complaint was "premature" and

that he should have been afforded the benefit of oral argument on the motion to dismiss, it was not an abuse of the district court's discretion to dismiss the complaint under Rule 12(b)(6) without first hearing oral argument. *See Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994); Fed. R. Civ. P. 78.

IV.

Because the plaintiff in this case can prove no set of facts, consistent with his pleadings, that would entitle him to relief on any of his claims, the district court did not err in dismissing with prejudice the entire complaint against both defendants. The district court's judgment is **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JACKIE RAY CLINE, Plaintiff,	)	
v.	)	1:93-cv-386
GEORGE W. ROGERS, INDIVIDUALLY and IN HIS CAPACITY AS SHERIFF OF MCMINN COUNTY, and MCMINN COUNTY, Defendants.	)	(Filed Sept. 12, 1994)

MEMORANDUM

This action involves a county sheriff's disclosure of criminal history information about the plaintiff. The plaintiff asserts claims under the U.S. Constitution, 42 U.S.C. § 3789g, 42 U.S.C. § 1983, and the Tennessee Constitution. Before the Court is defendant McMinn County's motion to dismiss pursuant to Fed. R. Civ. P. 12b(6). For the reasons that follow, McMinn County's motion will be **GRANTED.**

I. Facts

In late 1992, a private citizen went to the McMinn County Sheriff's Department and asked the sheriff, defendant George Rogers, to check the criminal record of the plaintiff, Jackie Ray Cline. Rogers allegedly searched state and local records and requested a computer search of Federal Bureau of Investigation records. According to

Cline, Rogers disclosed the information he obtained on Cline to the inquiring citizen. In complying with the request for information on Cline, Rogers purportedly violated Tennessee Bureau of Investigation rules regarding disclosure of criminal record information.

In this action Cline asserts five claims against Rogers and McMinn County: (1) a claim under 42 U.S.C. § 1983 for violation of 42 U.S.C. § 3789g, (2) a claim under 42 U.S.C. § 3789g for violation of the same, (3) a claim under 42 U.S.C. § 1983 for violation of his constitutional right of privacy, (4) a claim directly under the Constitution for violation of his right of privacy, and (5) a claim for violation of his right of privacy under the Tennessee Constitution. McMinn County moves the Court to dismiss the plaintiff's claims against it for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12b(6).

II. Standard of Review

In considering a Fed. R. Civ. P. 12(b)(6) motion, the Court regards all well-pleaded allegations in the complaint as true, construing them in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jones v. City of Carlisle, Ky.*, 3 F.3d 945, 947 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1218 (1994); *Song v. City of Elyriz, Ohio*, 985 F.2d 840, 843 (6th Cir. 1993); *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). Dismissal of a complaint under Fed. R. Civ.P. 12b(6) for failure to state a claim is warranted only when the plaintiff undoubtedly cannot prove any set of facts consistent with his allegations which would entitle him to some relief, i.e., the plaintiff is not entitled to relief

despite the facts as pleaded. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Collins*, 892 F.2d at 493.

III. Analysis

A. Section 1983 claim for violation of 42 U.S.C. § 3789g

Under 42 U.S.C. § 1983, a private cause of action exists for "the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the U.S. Supreme Court determined that § 1983 provides a private cause of action for violations of federal statutes as well as the Constitution. *Thiboutot*, 448 U.S. at 4. In decisions subsequent to *Thiboutot*, the Supreme Court has determined that two exceptions exist to this rule. A plaintiff alleging a violation of a federal statute may enforce the statute under § 1983 unless: (1) " 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' ", or (2) when " 'Congress has foreclosed such enforcement . . . in the enactment itself.' " *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987)); *see Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Wood v. Tompkins*, ___ F.3d ___, No. 93-3684, 1994 WL 462382, at *3 (6th Cir. Aug. 29, 1994); *Audette v. Sullivan*, 19 F.3d 254, 256 (6th Cir. 1994).

To determine whether a provision creates an "enforceable right" under the first exception, the Court must apply a three-part test. The Court must ask (1)

whether the provision " 'was intend[ed] to benefit the putative plaintiff.' " *Wilder*, 496 U.S. at 509 (quoting *Golden State*, 493 U.S. at 106)). If answered in the affirmative, the provision creates an enforceable right unless (2) "it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," *id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)), or unless (3) "the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " *Id.* (quoting *Golden State*, 493 U.S. at 106) (some internal quotations omitted); *see Wood*, 1994 WL 462382, at *3 (setting forth three-part test). The plaintiff bears the burden of proof under this exception. *Golden State*, 493 U.S. at 106; *Wood*, 1994 WL 462382, at *3.

With respect to the second exception, Congress may foreclose enforcement under § 1983 by "providing a comprehensive enforcement mechanism for protection of a federal right." *Golden State*, 493 U.S. at 106 (internal quotations omitted); *see Wood*, 1994 WL 462382, at *3. That the statute merely makes available administrative protections is not sufficient. *Golden State*, 493 U.S. at 106; *Wood*, 1994 WL 462382, at *3. Instead, the "statutory framework must be such that allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress' carefully tailored scheme." *Golden State*, 493 U.S. at 107 (internal quotations omitted). The defendant bears the burden of proof under this exception. *Id.*; *Wood*, 1994 WL 462382, at *3.

At issue in this case is whether the plaintiff may bring a cause of action under § 1983 for a violation 42 U.S.C. § 3789g. Before making this determination, however, the Court must determine which subsection of

§ 3789g that the plaintiff claims the defendants violated. The plaintiff does not make this clear in his complaint. This determination is important because the Supreme Court has instructed that "each statute must be interpreted by its own terms" in determining whether the statute gives rise to a right enforceable under § 1983. *Suter v. Artist M.*, ___ U.S. ___, 112 S. Ct. 1360, 1367 n.8, 118 L. Ed. 2d 1, 13 n.8 (1992); *see Wood*, 1994 WL 462382, at *9 (considering subsections of 42 U.S.C. 1396n(c)(2) separately and concluding that some subsections give rise to enforceable rights under § 1983 while others do not).

Section 3789g generally addresses the confidentiality of information disseminated pursuant to the Justice System Improvement Act, Pub. L. No. 96-157, 93 Stat. 1167 (1979), which amended the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3797 (collectively, "the Act"). Subsection (a) of section 3789g prohibits officers or employees of the Federal Government or recipients of assistance under the Act from revealing, for any purpose other than for which it was obtained under the Act, "research and statistical information" that is identifiable to any specific person. *Id.* § 3789g(a). Subsection (b) concerns "criminal history information" and provides that "the Office of Justice programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes." *Id.* § 3789g(b). Finally, subsection (c) concerns "criminal intelligence systems and information" and provides that all criminal intelligence systems operating under the Act shall operate in conformance with policy standards which, among other things, assure that

the "systems are not utilized in violation of the privacy and constitutional rights of individuals." *Id.* § 3789g(c).

"Criminal history information" is defined under the Act as including "records and related data, contained in an automated or manual criminal justice informational system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release." *Id.* § 3791(a)(9). "Research or statistical information" and "criminal intelligence systems and information" are not defined under the Act. Department of Justice regulations, promulgated in part under the Act, however, do define or clarify the terms.

Under Department of Justice regulations, "research or statistical information" is defined as "any information which is collected during the conduct of a research or statistical project and which is intended to be utilized for research or statistical purposes." 28 C.F.R. § 22.2(d) (1993). The term "research or statistical project" means "any program, project, or component thereof which is supported in whole or in part with funds appropriated under the Act and whose purpose is to develop, measure, evaluate, or otherwise advance the state of knowledge in a particular area." *Id.* § 22.2(c).

The Department of Justice regulations define criminal "intelligence systems" as "the arrangements[,] equipment, facilities, and procedures used for the continuing storage, exchange and analysis of criminal intelligence data." *Id.* § 23.3(b). Although the Department of Justice

regulations do not define "criminal intelligence information," they do clarify the term by explaining that it refers to ongoing criminal *activity* typically related to such crimes as loan sharking, narcotics, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials. *Id.* § 23.2.

After reviewing the record and applicable law, the Court concludes that the only subsection of 3789g arguably applicable in present case is subsection (b), the subsection that addresses the confidentiality of criminal history information. The plaintiff alleges in his complaint that a private citizen requested that defendant Rogers conduct a search to find out if the plaintiff had ever been arrested. Rogers allegedly conducted the search and disclosed to the citizen the plaintiff's criminal record. A search of a person's arrest records is consistent with a search of a person's "criminal history." Indeed, the definition of "criminal history information" includes "records of arrests[] and the nature and disposition of criminal charges." 42 U.S.C. § 3791(a)(9). The plaintiff does not allege in this case that the private citizen and Rogers were collecting information pursuant to a research or statistical project and intended to utilize the information for research or statistical purposes, as contemplated under § 3789g(a). Nor does the plaintiff allege that Rogers provided "criminal intelligence information" pertaining to some alleged criminal activity by the plaintiff, as contemplated under § 3789g(c). For these reasons, therefore, the plaintiff could only claim in this action that the defendants violated the "criminal history information" provision of § 3789g(b).

Whether § 1983 accords a private cause of action to plaintiffs alleging a violation of § 3789g(b) is not a question of first impression. In *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983), a case in which the defendant allegedly revealed "certain statistical *and* criminal history information about the plaintiff, the U.S. Court of Appeals for the Seventh Circuit determined that § 1983 does not accord a private cause of action for violations of § 3789g(b) or § 3789g(a). With respect to subsection (b), the court concluded that the subsection does not create an enforceable right. The court reasoned that the subsection is administrative in nature in that it imposes obligations on a federal actor to assure that the information is only used for the purposes for which it was collected. ***Polchowski,*** 714 F.2d at 751. With respect to subsection (a), the court concluded that the subsection does create an enforceable right but is not actionable under § 1983 because Congress had foreclosed such an action by creating a comprehensive remedial scheme under the Privacy Act of 1974, 5 U.S.C. 552a, a statute separate from § 3789g. *Id.* at 1752.

Although this Court need not determine, for reasons already discussed, whether the Seventh Circuit reached the correct result with regard to § 3789g(a), the Court reaches the same result as the Seventh Circuit with regard to § 3789g(b). As previously noted, a statute does not confer an enforceable right if it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the defendant governmental unit. *Wildler,* 496 U.S. at 509; *Woods,* 1994 WL 462382, at *3. The defendant governmental unit in this case – McMinn County – has no binding obligations under § 3789g(b).

Section 3789g(b) only imposes obligations on the Office of Justice Programs, which is a branch of the U.S. Department of Justice. 42 U.S.C. §§ 3711, 3789g(b). The Sixth Circuit has made clear that a plaintiff has no § 1983 right of action against a state actor for the violation of a federal statute where the statute is essentially administrative in nature and *imposes an obligation exclusively upon federal, not state, actors. Woods*, 1994 WL 462382, at *7; *Audette v. Sullivan*, 19 F.3d 254, 257 (6th Cir. 1994). Whether a state or federal actor has an obligation under a statute depends upon whom the statute places the "onus of compliance." *Woods*, 1994 WL 462382, at *7; *Audette*, 19 F.3d at 256-57. In this case, the onus of compliance with § 3789g(b) clearly falls on the Office of Justice Programs. *See* 42 U.S.C. § 3789g(b) ("[T]he Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for. . . . "). Because the onus of compliance falls on a federal, rather than state, actor, § 3789g(b) cannot confer a right enforceable under § 1983.

Furthermore, the Court agrees with the Seventh Circuit that § 3789g(b) is essentially administrative in nature. Although the subsection does provides that the "Office of Justice Programs shall assure the security and privacy of all information is adequately provided for," for subsection does not *entitle* individuals to privacy rights with respect to their criminal history, nor does it reference *individuals'* privacy interests. The subsection, therefore, may be fairly read to impose only a generalized duty on the Office of Justice Programs, rather than create a private, enforceable right. *See Suter*, ___ U.S. at ___, 112 S. Ct. at 1370, 118 L. Ed. 2d at 16 (concluding that language in statute requiring a state to have a plan providing that

"reasonable efforts" will be made to prevent or eliminate the need for removing a child from his home imposes only a generalized duty upon the state rather than creates an enforceable right).

Finally, it is worthy of noting that § 3789g(d) sets forth penalties for persons who violate § 3789g. This subsection provides that "[a]ny person violating the provisions of this section, or any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law." *Id.* § 3789g(d). Although this subsection may not amount to a comprehensive enforcement mechanism that conclusively evidences congressional intent to foreclose a § 1983 cause of action for a violation of § 3789g, it does show that the absence of a § 1983 cause of action for a violation of the section does not render the section a dead letter. *See Suter*, ___ U.S. at ___, 112 S. Ct. at 1368-69, 118 L. Ed. 2d at 14 (observing that 42 U.S.C. § 671(a)(15) is not a dead letter without a private cause of action under § 1983 in light of certain statutory provisions enabling the Secretary of Health and Human Services to take actions against states).

For all of the foregoing reasons, therefore, the Court concludes that § 1983 does not accord the plaintiff a private cause of action for a violation of § 3789g(b). His § 3789g claim brought pursuant to § 1983 will therefore be **DISMISSED.**

B. Claim Directly Under § 3789g

For similar reasons, plaintiff's claim directly under § 3789g(b) will also be **DISMISSED.** To prove the existence of an implied cause of action under a statute, the plaintiff must prove that Congress intended to make a private remedy available to enforce the provisions of the statute. *Suter,* ___ U.S. at ___, 112 S. Ct. at ___, 118 L. Ed. 2d at 16; *see Smith v. Dearborn Fin. Servs., Inc.,* 982 F.2d 976, 980 (6th Cir. 1993) (noting that congressional intent is the dispositive factor in determining whether a private cause of action is implicit in a statute); *see also Cort v. Ashe,* 422 U.S. 66, 78 (1975) (setting forth familiar four-part test). As this Court has already determined, § 3789g(b) does not create an enforceable right for the plaintiff in part because it only imposes a generalized duty upon the Office of Justice Programs. Additionally, § 3789g provides its own enforcement mechanism by way of the penalties that may be imposed under § 3789g(d). In light of these statutory provisions, the Court concludes that Congress did not intend to enforce § 3789g(b) by way of private rights of action. *Cf. Suter,* ___ U.S. at ___, 112 S. Ct. at 1370, 118 L. Ed. 2d at 16 ("Having concluded that § 671(a)(15) does not create a federal enforceable right . . . under § 1983, the [implied right of action claim] may be disposed of quickly.").

C. Constitutional Claim

The plaintiff also claims that his constitutional right of privacy was violated by the disclosure of his criminal

history information. The plaintiff brings this claim both directly under the Constitution and pursuant to § 1983.

The plaintiff's claim is without merit. In the case of *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), the U.S. Court of Appeals for the Sixth Circuit determined whether the dissemination of juvenile delinquents' "social histories" violated the juveniles' constitutional rights of privacy. The Sixth Circuit acknowledged that the Supreme Court had made "isolated statements" in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) that, when read out of context, lent support to the juveniles' claim, but the Sixth Circuit ultimately held that "the Constitution does not encompass a general right to nondisclosure of private information." *DeSanti*, 653 F.2d at 1090.

In the recent case of *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994), the Sixth Circuit confronted the issue of whether the disclosure of an inmate's HIV infection violated the inmate's constitutional right of privacy. The Sixth Circuit followed *DeSanti* and held that the inmate's constitutional right of privacy was not violated by the disclosure. *Wingginton* [*sic*], 21 F.3d at 740. The Court found that the inmate's privacy interest in his HIV infection was indistinguishable from the juveniles' privacy interest in their social histories. *Id.*

This Court concludes that *DeSanti* and *Wingginton* [*sic*] control the present case. The plaintiff's privacy interest in his criminal background is no greater than the inmate's privacy interest in his HIV infection or the juveniles' privacy interest in their social histories.

Accordingly, plaintiff's claim his constitutional rights of privacy was violated will be **DISMISSED.**

Because the Court makes this determinations [sic] based on the substantive constitutional right of privacy, it matters not whether plaintiff brings his claim directly under the Constitution or pursuant to § 1983. The result is the same under either approach. His claim directly under the Constitution, therefore, will also be **DISMISSED.**

D. Tennessee Constitutional Claim

The plaintiff also claims that the disclosure of his criminal background violates the Tennessee Constitution. Tennessee courts, however, do not recognize a private cause of action to recover damages for violations of the state constitution. *See Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App.1992) ("We have held . . . in prior case that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer."); *see also Bennett v. Horne*, No. 89-31-II, 1989 WL 86555, at *2 (Tenn. Ct. App. Aug. 2,1989) ("This court knows of no authority for the recovery of damages for a violation of article I, section 7 of the Tennessee Constitution."). Accordingly, the plaintiff's claim under the state constitution will be **DISMISSED.**

IV. Conclusion

For the foregoing reasons, defendant McMinn County's motion to dismiss pursuant to Fed. R. Civ. P. 12(b) will be **GRANTED.**

Although only defendant McMinn County moves for dismissal of this action, the Court raises the motion *sua sponte* with respect to the other defendant, Sheriff Rogers. A court may raise a Rule 12(b)(6) motion *sua sponte* when the court:

> "(1) allow[s] service of the complaint upon the defendant; (2) notif[ies] all parties of its intent to dismiss the complaint; (3) give[s] the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended *sua sponte* dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state it reasons for dismissal."

Morrison v. Tomano, 755 F.2d 515, 516 (6th Cir. 1985) (quoting *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983)). A *sua sponte* dismissal under Rule 12(b)(6) is not necessarily invalid because of a lack of service on the defendant or a failure to provide the defendant an opportunity to respond. *Id.* at 517.

In this case, the requirements of *Tomano* are met. Although the Court did not notify the plaintiff of its intent to dismiss the complaint with respect to defendant Rogers, McMinn County's motion to dismiss put the plaintiff on notice that his complaint was subject to complete dismissal.[1] This is especially true considering that

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[1] Although McMinn County only argued in support of its motion that the plaintiff was not entitled to recover on his claim that McMinn County had violated 42 U.S.C. § 3789g, the motion put the plaintiff on notice that his other claims against McMinn County were subject to dismissal. Indeed, McMinn County moved that the Court dismiss the plaintiff's "complaint."

the plaintiff brings the same claims against both defendants in this action and that he sues Rogers, in part, in his official capacity as Sheriff of McMinn County. A suit against Rogers in his official capacity is indistinguishable from a suit against the county itself. Furthermore, in light of McMinn County's motion, the plaintiff has had an adequate opportunity to amend or respond to McMinn County's proferred reasons for dismissal. Although it is apparent that defendant Rogers will not have an opportunity to respond to the Court's intended dismissal, the Court is satisfied, in accordance with *Tomano*, that Rogers will not be unduly prejudiced by the dismissal.

Thus, for the same reasons that the Court concludes that the Plaintiff's claims against McMinn County will be **DISMISSED**, the Court also concludes that plaintiff's claims against Rogers will be **DISMISSED.**

An order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE